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Supreme Court of the United States

Nos. 847, 877

October Term, 1965

NICHOLAS DEB. KATZENBACH, Attorney General of the United States, *et al.*,

Appellants,

against

JOHN P. MORGAN and CHRISTINE MORGAN,

Appellees.

NEW YORK CITY BOARD OF ELECTIONS, etc.,

Appellant,

against

JOHN P. MORGAN and CHRISTINE MORGAN,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF, *AMICUS CURIAE*, ON BEHALF OF LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL, IN SUPPORT OF APPELLEES

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Statement

Appellants have appealed to this Court from an order and judgment of the United States District Court of the District of Columbia, which judgment declared § 4(e) of the Voting Rights Act of 1965 (Public Law 89-110, 79 Stat. 439) unconstitutional as beyond the power of Congress to

enact either under the Fourteenth Amendment to the United States Constitution or under Article IV, § 3 of that Constitution. The consequence of this decision was to uphold the validity of the provisions of New York Constitution, Article II, § 1, and New York Election Law, §§ 150 and 168, which require voters in this State to be literate in the English language.

Interest of the *Amicus Curiae*

This brief is filed, *amicus curiae,* by the Attorney General of New York pursuant to his statutory duty to defend the constitutionality of State statutes. There is, in this case, no issue of discrimination against qualified voters on grounds prohibited by the Fifteenth or Nineteenth Amendments to the United States Constitution, nor is there any intent or interest on the part of *amicus* here to prevent any qualified voters from exercising their right of franchise nor has there been any such suggestion that such was the intent. The position of *amicus* here is solely to uphold the right of the State to determine the qualification of voters, within the framework of the exceptions specifically provided in the Federal Constitution, and to freely and without restraint select those qualifications which are permitted by the Constitution.

Questions Presented

The questions presented by this appeal relate directly to the power of Congress and the States under the Constitution of the United States in regard to establishing qualifications for voting. In summary, these questions are:

1. Whether the power of Congress to enforce the Fourteenth Amendment to the United States Constitution,

by appropriate legislation, authorizes an enactment, such as § 4(e) of the Voting Rights Act, barring State requirements of English literacy as a qualification for voting;

2. Whether New York State's requirement of English literacy as a qualification for voting in fact violates any provision of the Fourteenth Amendment; and

3. Whether the power of Congress to govern the territories of the United States includes the power to prohibit the States from requiring literacy in English as a qualification for voting, in so far as territorial natives are concerned.

Factual Background

Section 4(e) of the Voting Rights Act of 1965 (P. L. 89-110, 79 Stat. 439), as applicable here, prohibits denial of the right to vote to any person in any Federal, State or local election because of his inability to read, write, understand, or interpret any matter in the English language if he demonstrates that he has successfully completed six grades in a public school or accredited private school in Puerto Rico in which the predominant classroom language was other than English. The Act became effective on August 6, 1965.

On the day the Act became effective the plaintiffs filed a complaint in the United States District Court for the District of Columbia, pursuant to the provision of § 14(b) of the Voting Rights Act of 1965, requesting the covening of a three-judge Court, and alleging that § 4(e) is unauthorized under the Fourteenth Amendment to the United States Constitution, violates the provisions of the Tenth Amendment, and deprives plaintiffs of rights under the Fifth and

Ninth Amendments (R. 1-3). Plaintiffs asked for a "declaratory" judgment holding § 4(e) unconstitutional (R. 3).

The Commissioners of Election of New York City were subsequently added as parties defendant (R. 10-12).

The answer of defendant Katzenbach alleged that the New York English literacy requirements were unconstitutional and denied allegations of the unconstitutionality of the Federal Act (R. 37-39).

Plaintiffs moved for summary judgment based upon pleadings before the Court and memoranda of law (R. 19-20). Defendants cross-moved for summary judgment, additionally alleging, in effect, that the purpose and effect of the New York law was discrimination against Puerto Ricans, but nowhere in the pleadings or in the motions for summary judgment was any allegation made that the section was enacted in implementation of the powers of Congress pursuant to Article IV, § 3.

Decision Below

Two members of the Court joined in holding § 4(e) unconstitutional (District Judges HOLTZOFF and MCGARRAGHY) (247 F. Supp. 196). Circuit Judge MCGOWAN dissented in a separate opinion.

Discussing the Voting Rights Act as a whole and the legislative history of § 4(e), the majority opinion observed (R. 83-84):

> "The voting Rights Act of 1965 is primarily intended to prevent discriminatory administration of the right to register and vote. Potent machinery is created by the statute to achieve this end. Section 4(e) is, however, completely and entirely disassociated from the

rest of the Act and constitutes no part of the scheme of the legislation. The measure originated in the Senate. Section 4(e) was not in the bill as reported by the Senate Committee on the Judiciary. It was inserted by an amendment from the floor. After the bill passed the Senate, the House of Representatives struck out the entire bill except the enacting clause and substituted a different measure, which again did not include any such provision. Section 4(e) was, however, reinserted by the Conference Committee and remained in the measure as finally passed. It is quite apparent that the Section did not receive consideration by any legislative Committee in either House. While Section 4(e) was directed at the Puerto Rican situation in New York, which has already been briefly described, actually it is much broader in its phraseology and scope and conceivably may be applicable to many other citizens who are illiterate in English, and is effective throughout the United States."

The Court then pointed out that "traditionally and historically the qualifications of voters has been a matter regulated by the States" (R. 84) and that "no express or implied power is conferred by the Constitution on Congress to legislate concerning requirements of voters in the several States" (R. 84). The Court below also recognized that *the right of suffrage is not a privilege and immunity of a citizen of the United States as such, but is a right conferred by the States* (R. 84-85). Constitutional amendments, the Court pointed out, were necessary to guarantee women the right to vote and to eliminate poll taxes as a qualification for voting in Federal elections (R. 85-86).

The right of the States to establish non-discriminatory literacy tests as a qualification for voting has been recently upheld by this Court (*Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45 [1959], a case the Court below observed, which dealt with an *English* literacy requirement (R. 86-87).

Of course, the District Court recognized that there are limitations upon the rights of the States to establish voter qualifications, stating (R. 87-88):

> "There are indeed constitutional limitations on the power of the States to prescribe qualifications for voters. Each of these restrictions, however, has been imposed by an Amendment to the Constitution of the United States. Thus, the Fifteenth Amendment, which became effective in 1870, bars the States from denying or abridging the right of citizens of the United States to vote on account of race, color, or previous condition of servitude * * *.
>
> "By the Nineteenth Amendment, which took effect in 1920, the States are precluded from denying the right of suffrage to women. * * *
>
> "The latest Constitutional Amendment in this field is the Twenty-fourth Amendment, which prevents the States from imposing a poll tax as a condition for voting in Presidential and Congressional elections. * * *
>
> "Thus whenever Congress took steps to prohibit the States from imposing a particular requirement or qualification for voting, no matter of what kind, it invariably did so by initiating and proposing a Constitutional Amendment, which later was ratified by the States. So far as is known, until the passage of the Voting Rights Act of 1965, Congress never attempted to achieve this result by legislation. It is quite evident, therefore, that it was the continuous and invariable view of the Congress that it may not intrude into this field and does not have power to regulate the subject matter by legislative enactment. If Congress had the authority to take such action by legislation, the use of the laborious process of amending the Constitution would have been an exercise in futility or at least unnecessary surplusage."

The Court further held that a distinction between persons literate in English and those not literate in English is a reasonable classification and not a violation of the equal protection clause of the Fourteenth Amendment (R. 89).

As to the intimation in the cross-motion for summary judgment that the New York statute's purpose was discrimination against Puerto Ricans, the Court held (R. 90):

> "A veiled intimation that the New York literacy test was intended to exclude Spanish-speaking citizens from the franchise is both irrelevant in law and untenable in fact. The requirement was originally adopted in 1921—long before the large influx of Puerto Ricans into New York."

While not appearing anywhere in the pleadings, the defendants contended on oral argument before the District Court that § 4(e) could be sustained as an exercise of the power of Congress to regulate the territories pursuant to Article IV, § 3, of the Constitution. Rejecting this argument, the Court held (R. 90):

> "There are two answers to this contention. First, Section 4(e) is broad and comprehensive in its terms and is neither limited nor directed solely to Puerto Ricans and, therefore, cannot be deemed an exercise of the power to legislate for Puerto Rico. Second, and more important, the power of Congress to legislate for a territory does not embrace authority to confer additional rights on citizens of the territory when they migrate to other parts of the United States. The Congress may not endow them with rights not possessed by other citizens of the State to which they have moved."

The dissenting member of the Court adopted the argument that § 4(e) was a valid exercise of the power of Congress to govern the territories. This result was arrived at by posing a hypothetical situation, assuming its rather questionable validity, and then arguing that § 4(e) was a parallel situation (R. 94). Thus, instead of reasoning based on § 4(e) alone, this opinion creates a new problem, unrelated to the case, *i. e.*, the validity of an irrelevant hypothesis.

The dissenting Judge found in § 4(e) an extension of the legislative tradition of giving Puerto Ricans self-government in the Commonwealth (R. 93), without considering the fact that § 4(e) has no application whatsoever in the Commonwealth itself and can in no way further self-government there. This Judge, therefore, considered the suggested policy of Congress in fostering education in Spanish in Puerto Rico to warrant Congressional invalidation of an otherwise valid State statute (R. 98, 99).

Background of New York English Literacy Law

New York's English literacy requirements became part of its law in 1921 by amendment of the State Constitution (Art. II, § 1) and in 1923 by amendment of the Election Law (L. 1923, ch. 809). At the time of enactment there were only 7,000 Puerto Ricans living in New York City. By no stretch of the imagination can New York's English literacy provisions be interpreted as deliberate discrimination against this group, as intimated in the cross-motion for summary judgment by the defendant in this proceeding (R. 41). An examination of the history of the English literacy requirement will further effectively disprove any intent to discriminate against any group.

In 1920, the preliminary report of a Joint Legislative Committee of the New York State Legislature recommended an increase in the extention of education facilities to the foreign-born and native adult populations (Leg. Doc. No. 52, 1920, pp. 6-7). One purpose to be promoted was vocational efficiency and it was recommended that classes be set up in factories and other places of employment.

Governor Alfred E. Smith, in a message to the State Assembly in 1919, stated:

> "Ignorance is the greatest ally of our poor citizenship. It should be our objective that no person in this State who can be brought under our influence should be without the ability to read and write, or without a clear conception of our American institutions and ideals."

The English literacy provisions of New York's law were adopted at a time when the attention not only of the State but the nation as a whole was focused on the problems of illiteracy which had come to the forefront during World War I.

In March 1918, then Secretary of the Interior Lane wrote to President Woodrow Wilson:

> "I believe that the time has come when we should give serious consideration to the education of those in the United States who cannot read or write. The war has brought facts to our attention that are almost unbelievable and that in themselves are accusatory. An uninformed democrary is not a democracy."

The Joint Legislative Committee in its report noted the effect of Lane's letter upon its recommendations, stating:

> "The astounding revelations of illiteracy and of complete ignorance of the English language among the men drafted for service in the late war, have been given to us by the Secretary of the Interior. Mr. Lane's figures speak for themselves, approximately:
>
> 'Forty thousand men in the army who could not take commands in English;
>
> 'Four hundred thousand men of draft age in the country who could not read or write in any language.' "

In their article, "The Case Against Night Work", Josephine Goldmark and Louis Brandeis wrote:

> "Ignorance of the English language is the greatest obstacle to industrial advancement. It prevents the distribution of congested immigrant populations and increases injuries and occupational diseases, owing to

> the immigrants' inability to understand orders or hygienic regulations printed or orally given in industrial establishments."

Thus, New York's English literacy requirement for voting was a part of a much greater program for literacy and education for all—the need for which had been demonstrated by wartime experience of inefficiency and inability to communicate. In addition to the voter qualification amendment, the Committee also recommended broad Education Law amendments, extending night schools and requiring training of minors from 16 to 21, even if employed.

At approximately the same time, the 66th Congress was considering a Senate-introduced Americanization act. The purpose of that bill was stated to be:

> "* * * to consider a program of Americanizing illiterates and those unable to speak, read or write the English language. The theory of the bill is the process of stimulating the states to adopt certain compulsory teaching of English to illiterates and to that great body of those in this country who cannot speak, read or write the English language."

As early as 1906, Congress required naturalized aliens to be able to speak English (34 Stat. 599, § 8). In 1950, the Naturalization Act was amended to require *literacy* in English (64 Stat. 987, § 30); a requirement repeated in the Immigration and Naturalization Act of 1952 (66 Stat. 163).

The recommendations of New York's Joint Legislative Committee resulted in adoption by the voters of New York in 1921 of an amendment to the New York Constitution, requiring that all new voters after January 1, 1922 must be literate in English. This constitutional amendment was implemented by amendments to the State Election Law in 1923 (L. 1923, ch. 809).

New York's English literacy requirements were thus adopted not to discriminate against any group of persons, but to meet an observed need to raise the educational standards of the population as a whole and to produce a better informed and more responsible electorate.

Legislative History of Section 4(e)

The Voting Rights Act of 1965 is primarily intended to prevent discriminatory administration of the right to register and vote. The purpose of the basic act is clearly expressed in § 2, which states:

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *to deny or abridge the right of any citizen of the United States to vote on account of race or color.*" (Italics added.)

Its intent was to protect rights guaranteed by the Fifteenth Amendment to the United States Constitution and was enacted after intensive study by Congress of racial discrimination in voting. The House and Senate Judiciary Committees each held nine days of hearings and received testimony from a total of 67 witnesses.

None of that testimony and none of that study concerned the provisions subsequently enacted as § 4(e)!

As stated by the Court below (R. 83):

> *"Section 4(e) is, however, completely and entirely disassociated from the rest of the Act and constitutes no part of the scheme of the legislation."* (Italics added.)

This section was inserted in the bill by amendment from the floor in the Senate. After the bill passed the Senate, the House of Representatives struck out the entire bill, except the enacting clause, and substituted a different measure, which again did not include any such provision

as § 4(e). The section was reinstated by the Conference Committee and remained in the measure as finally passed (R. 83).

Section 4(e) received no consideration by any legislative committee in either House. While directed at the Puerto Rican residents of New York, actually § 4(e) is much broader in its terms, may conceivably be applicable to many other citizens who are illiterate in English and is effective throughout the United States.

The debate on § 4(e) was confined to floor debate on parts of two days (May 20 and August 4, 1965). Its proponents argued that exclusion of Puerto Ricans, not literate in English although literate in Spanish, from participation in elections in New York is an arbitrary classification in violation of the Fourteenth Amendment (Cong. Rec., May 20, 1965, p. 10675). The opponents of the measure pointed to the cases which had held English literacy requirements not violative of the Fourteenth Amendment provisions and questioned the constitutional power of Congress to impose such a requirement upon the States (see, *e.g.*, Cong. Rec., Aug. 4, 1965, p. 18663).

No mention was made by the proponents of any argument that § 4(e) was to be enacted in furtherance of the power of Congress to govern the territories, although it was stated that education of Puerto Ricans in Spanish in Puerto Rico was a policy fostered by Congress (Cong. Rec., May 20, 1965, p. 10688).

Opposition to the amendment was expressed by Senator Hruska of Nebraska, a member of the conference committee, who stated (Cong. Rec., Aug. 4, 1965, p. 18663):

> "The reasons why I was opposed to this provision are first, that it is a matter for the State itself to deal with; it is of doubtful constitutionality for Congress

to override this law. It is very important that a knowledge of the English language be possessed by a voter.

"Supporting evidence of this fact was found in the record. In the next general election in that State, there will be some 20 or 25 propositions on the ballot for the purpose of amending the New York State Constitution. Without a knowledge of the English language it would be virtually impossible for voters even to identify the amendments, let alone to scan them for the purpose of determining their substance and merit. For that reason, and for others, this Senator certainly disagreed with that provision.

"One of the further arguments is that the national policy is that there be common access to the facts and that the knowledge of English is necessary to discharge the responsibilities of citizens.

"We know that, because in order to become naturalized one must have a working knowledge of the English language. It is necessary to have that knowledge for the purpose of serving on a jury."

Basic arguments on the amendment centered around the power of Congress to enact the provision, not upon facts showing any discrimination. There were statements estimating the numbers of eligible Puerto Rican voters in New York, but no certain figures on registration were produced or statistics as to numbers of Puerto Ricans not eligible to vote because of the English literacy requirements. There was no testimony whatsoever taken as to this provision of the Voting Rights Act and no evidence of "an insidious and pervasive evil" such as this Court found to be the basis for the enactment of those provisions of the Voting Rights Act of 1965 dealing with Fifteenth Amendment rights (*South Carolina* v. *Katzenbach*, decided Mar. 7, 1966, 34 L. W. 4207, 4208).

Summary of Argument

The basic question on this appeal, presented by the decision of the Court below, is whether the power of Congress to enact legislation appropriate to the protection of rights guaranteed by the Fourteenth Amendment embraces an authority to enact a statute such as § 4(e) of the Voting Rights Act of 1965. Consequently, the primary argument advanced by this brief asserts that § 4(e) is not such appropriate legislation and, in fact, concerns no rights guaranteed by the Fourteenth Amendment.

Congress may enact a provision such as § 4(e) only if the English literacy provisions of New York's Constitution and statutes do, in fact, violate any rights guaranteed by the Fourteenth Amendment. An English literacy requirement, applicable to all citizens alike and applied in a nondiscriminatory manner, does not deny to any citizen the equal protection of the laws nor abridge privileges and immunities of United States citizenship.

The power of Congress to regulate and govern the territories does not authorize the enactment of a statute, applying to no territory but only to the States of the United States, which grants to former residents of a territory political rights greater than those enjoyed by other citizens of the States and which acts in derogation of rights reserved to the States by the Constitution of the United States.

Section 4(e) itself discriminates in that it prefers one class of native-born citizens over another.

POINT I

The power of Congress to enact legislation under the Fourteenth Amendment is limited by § 5 of the Amendment to legislation appropriate to the protection of rights guaranteed by that Amendment. Section 4(e) of the Voting Rights Act of 1965 relates to no rights guaranteed by the Fourteenth Amendment and is consequently not appropriate legislation.

In enacting § 4(e), Congress specifically declared that its purpose was to "secure the rights under the Fourteenth Amendment" to the United States Constitution. Section 5 of that amendment provides that Congress may enact "appropriate" legislation to enforce the prohibitions of the amendment. It has long appeared that the nature of that legislative authority was well understood. However, the position taken by the Justice Department in this case and § 4(e) itself compel a review of the cases which have dealt with the Congressional power.

In dealing with the power of Congress under the Civil War amendments, the Court, in *Ex parte Virginia* (100 U. S. 339 [1875]), stated (p. 345):

> "Congress is authorized to *enforce* the prohibitions by appropriate legislation."

The *caveat* in these words, however, is in the phrase "enforce the prohibitions". The power granted to Congress is not plenary; it is limited to enforcing the *prohibitions* of the amendments. As this Court stated, as to the powers of Congress under the Fifteenth Amendment, in *South Carolina* v. *Katzenbach* (*supra*, 34 L. W., p. 4213):

> "Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."

Once again, the power is described as the power to enforce prohibitions and this Court also recognized limits on that power by pointing out that the Court has found an exercise of the power to be unconstitutional when it "attacked evils not comprehended by the Fifteenth Amendment" (see *United States* v. *Reese*, 92 U. S. 214; *James* v. *Bowman*, 190 U. S. 127).

In a decision which followed *Ex Parte Virginia, supra*, by four years, this Court further elaborated upon the restrictions on Congressional action implicit in the terms of the amendment. In the *Civil Rights Cases* (109 U. S. 3), the Court stated (p. 13):

> "And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, *adverse to the rights of citizens sought to be protected by the Fourteenth Amendment*, no legislation of the United States under said amendment, nor any proceeding under such legislation can be called into activity; for the prohibitions of the amendment are against State laws and acts done under State authority." (Emphasis added.)

This Court there agreed that Congress could provide in advance to meet *actual* future violations, but that it could not define or enact laws relating to all rights protected, for this would be the Congressional enactment of a "municipal code", an act beyond the power of Congress.

A subtle but significant distinction is found in the Court's holding that Congress, under the Fourteenth Amendment, may not establish affirmative laws for the equal protection of the laws, but may only enact corrective legislation (109 U. S. at pp. 13-14). In dealing with the Federal statute involved in that case, the Court stated that the question to be considered was whether the law was, in fact, of a corrective character (109 U. S. at p. 14).

The same question is equally pertinent in the consideration of the issues presented by the instant case.

The validity of the principles enunciated in these early cases as to the power of Congress under the Fourteenth Amendment had acquired such an unquestioned status that, until the cases arising under the Voting Rights Act of 1965, there were no cases in this Court in this century in which the Court was required to pass upon the power of Congress under the amendment. The Court in those early cases, decided shortly after the adoption of the amendment, carefully considered the power granted to Congress thereby and, while the ambit of the substantive rights protected has been subsequently expanded, the power of Congress has not been similarly expanded beyond its original limits.

Worthy of further mention here are two other judicial expressions of the power of Congress under the Fourteenth Amendment. In *United States* v. *Cruikshank* (92 U. S. 542 [1875]), the Court held (p. 555):

> "The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees but no more. The power of the National Government is limited to the enforcement of this guaranty."

Significant to the argument that will be advanced at a later point in this brief, *i.e.*, that the determination of the qualifications of voters is a matter peculiarly within the jurisdiction of the States, is the holding of this Court in *In re Rahrer* (140 U. S. 545 [1891]), wherein the Court stated (pp. 554-555):

> "The Fourteenth Amendment, in forbidding a State to make or enforce any law abridging the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, did not invest and did not attempt to invest Congress with power to legislate upon subjects which are within the domain of state legislation."

The argument advanced on this appeal, that Congress may not create violations of the Fourteenth Amendment but only enforce its prohibitions, is consistent with the holding of this Court, in relation to the power of Congress to enforce the Fifteenth Amendment, in *South Carolina* v. *Katzenbach, supra,* wherein this Court observed that acts of Congress had been held unconstitiutional which "attacked evils not comprehended by the Fifteenth Amendment" (34 L. W., p. 4213) and sustained certain provisions of the Voting Rights Act of 1965, holding that Congress may fashion specific remedies and apply them to particular localities (34 L. W., p. 4214). Section 4(e), however, does not fashion a remedy but creates a new violation. It attempts to categorize, as a violation of the Fourteenth Amendment, State action which in the past not only has been held not to violate the amendment but has been held to be in an area not comprehended within the terms of the Fourteenth Amendment.

Prior Federal legislation under this amendment has not established new substantive violations, but only enunciated in statute form those rights which had judicial precedent for inclusion. The statutory provisions referred to by this Court in *Virginia* v. *Rives* (100 U. S. 313 [1879]) merely incorporated, under the Fourteenth Amendment, rights which had already been declared to be rights of United States citizenship under the Fifth Amendment.

Even assuming that Congress may enact legislation defining rights deemed to be protected by the amendment, the interpretation of the extent of these rights is the province of the Courts and the Courts are the final arbiters of whether such are, in fact, rights protected by the Fourteenth Amendment.

Consequently, unless provisions such as those of the New York Constitution and Election Law, requiring literacy in English as a qualification for voting, actually violate any rights guaranteed by the Fourteenth Amendment, § 4(e) is, as the Court below held, beyond the power of Congress to enact and, therefore, unconstitutional.

POINT II

A State requirement that its voters be literate in the English language is not unreasonable or arbitrary and does not violate any rights guaranteed by the Fourteenth Amendment to the United States Constitution.

Because Congress may only enact "appropriate" legislation to protect rights guaranteed by the Fourteenth Amendment, § 4(e)'s validity depends upon a finding that New York's English literacy requirement is in derogation of rights guaranteed by the Fourteenth Amendment and thus unconstitutional. Conversely, if as contended here New York's requirements do not violate any provision of the Fourteenth Amendment, § 4(e) is not within the power of Congress to enact under that amendment.

A. The establishment of voter qualifications is a power reserved to the States by the Constitution and the right to vote is an incident of State and not National citizenship.

The United States Constitution, from its inception, has specifically confirmed the reservation to the States of their

right to prescribe the qualifications of their voters and to regulate their elections generally. Article I, § 2, referring to the election of members of the House of Representatives, provides:

> "The electors in each State shall have the qualifications requisite for Electors of the most numerous branch of the State Legislature."

As to the control of the States over Congressional elections, Article I, § 4 provides, in part:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof * * *."

Forty-five years after the Fourteenth Amendment became effective, the member States of the Union once again reaffirmed this division of powers between the Nation and the States. In the Seventeenth Amendment they provided:

> "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

This principle of the Constitution, that the qualifications to be possessed by voters are within the sole province of the States, has been reaffirmed time and again by this Court, beginning with *Minor* v. *Happersett* in 1875 (21 Wall. 162). In that oft cited decision, the Court stated (pp. 177-178):

> "Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice, long continued, can settle construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be."

The power of the States to establish voter qualifications was discussed at length by the Court in *Pope* v. *Williams* (193 U. S. 621, 632 [1904]) wherein the Court held constitutional a Maryland statute requiring a declaration of intention to become a resident to be filed at least one year prior to qualification as a voter. In so doing the Court stated (pp. 632-633):

> "The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor* v. *Happersett*, 21 Wall. 162. It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution. The State might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in *Minor* v. *Happersett, supra*, such persons were allowed to vote in several of the States upon having declared their intentions to become citizens of the United States. Some States permit women to vote; others refuse them that privilege. A State, so far as the Federal Constitution is concerned, might provide by its laws that none but native-born citizens should be permitted to vote, as the Federal Constitution does not confer the right of suffrage upon anyone, and the conditions under which that right is to be exercised are matters for the States alone to prescribe, subject to the conditions of the Federal Constitution, already stated * * *."

The Court below in the instant case, holding § 4(e) unconstitutional, recognized that there are limitations on the power of the States to impose voter qualifications (R. 87-88):

> "Each of these restrictions, however, has been imposed by an Amendment to the Constitution of the United States."

Consequently, the States have the sole power to establish qualifications of voters, except as limited by the Fifteenth, Nineteenth and Twenty-fourth Amendments, and, except as they relate to those amendments, Federal laws may only protect the rights of voters who are qualified under State law. In the instant situation, New York's English literacy requirement is a qualification for voting, which does not discriminate in violation of any provisions of the above-cited amendments, and does not constitute discriminatory restriction upon those already qualified to vote.

Mr. Justice Douglas, writing for this Court in *Gray* v. *Sanders* (372 U. S. 368 [1963]), invalidating Georgia's county-unit system, reaffirmed the long established rules above stated when he wrote (p. 379):

> "States can within limits specify the qualifications of voters in both state and federal elections, the Constitution indeed makes voters' qualifications rest on state law even in federal elections. Art. I, § 2. As we held in *Lassiter* v. *Northampton Election Board*, 360 U. S. 45, a State may if it chooses require voters to pass literacy tests, provided of course that literacy is not used as a cloak to discriminate against one class or group. But we need not determine all the limitations that are placed on this power of a State to determine the qualifications of voters, for appellee is a qualified voter."

And further at pages 380-381:

> "Minors, felons, and other classes may be excluded. See *Lassiter* v. *Northampton Election Board, supra*, p. 51. But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded."

This opinion also clearly demonstrates the distinction between the voter qualification cases and the reapportionment cases, such as *Gray* v. *Sanders, supra*, and *Reynolds* v. *Sims* (377 U. S. 533 [1964]). In the latter group of cases,

this Court acted to protect qualified voters from illegal discrimination in the *counting* of their votes. Those cases did not effect any change in the principle of State power to initially determine qualifications.

In March of last year, Mr. Justice STEWART, writing for this Court in *Carrington* v. *Rash* (380 U. S. 89 [1965]) stated (p. 91):

> "There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed, '[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.' *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, 50. Compare *United States* v. *Classic*, 313 U. S. 299; *Ex parte Yarborough*, 110 U. S. 651. 'In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.' *Pope* v. *Williams, supra*, at 632."

While the *Carrington* case was cited in the Court below as authority for the proposition that discriminatory State voter qualifications may be invalidated under the equal protection clause of the Fourteenth Amendment, the Court below recognized the clear limitation of that case to the particular principle involved, stating (R. 89):

> "The States are barred from making an unreasonable classification between various groups of citizens in determining who should have the right to vote. Thus, in *Carrington* v. *Rash*, 380 U. S. 89, *supra*, it was held that while a State may impose reasonable residence requirements for voting, it may not deny the ballot to a *bona fide* resident merely because he is a member of the armed forces of the United States. In other words, the State is precluded from distinguishing between

> residents who are civilians and residents who are members of the armed services, on the ground that such a distinction is an unreasonable classification and discrimination in violation of the Equal Protection of the Laws clause."

However, the *Carrington* case is even more limited as a precedent in that the constitutional right protected thereby was not the right to vote but one of the basic, longer recognized rights of federal citizenship—the right to move from State to State and change one's residence. This Court recognized the right of the State to demand adequate proof of an intent to become a resident but denied the State the right to prevent a member of the armed services, or, in effect, a member of any other group, from becoming an actual resident of the State. The result would have been the same if the residency involved was a qualification for a professional license or property ownership instead of a voting qualification.

In *South Carolina* v. *Katzenbach, supra,* this Court cited the *Carrington* case in support of the proposition that States "have broad powers to determine the conditions under which the right of suffrage may be exercised" (34 L. W., p. 4213), adding the further considerations as to the Fifteenth Amendment (*ibid*):

> "The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of State power. 'When a State exercises power wholly within the domain of State interest, it is insulated from federal judicial review. But such insulation is not carried over where State power is used as an instrument for circumventing a federally protected right.' *Gomillion* v. *Lightfoot,* 364 U. S. at 347."

From the above quoted cases it is clear that the States have sole and plenary power, insulated from Congressional as well as judicial review, to determine the qualifications

of their voters, except as restricted by specific Constitutional prohibitions.

The essential question on this appeal, therefore, is does New York's English literacy qualification for voting actually violate any Fourteenth Amendment rights, bringing it within the ambit of Congressional power?

B. The right to vote, as an incident of State citizenship, is not within the rights of Federal citizenship guaranteed by the Fourteenth Amendment.

The provisions of the Fourteenth Amendment which have significance to this case are those guaranteeing equal protection of the laws and prohibiting the abridgment of privileges and immunities of citizens of the United States. Only four years after the adoption of the Fourteenth Amendment, the Supreme Court of the United States dealt with the definition of the privileges and immunities protected by that amendment in the *Slaughter-House Cases* (16 Wall. 36 [1872]). In those cases the Court stated:

> "* * * the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established." (p. 73.)
>
> * * *
>
> "Of the privileges and immunities of the citizens of the United States, and of the privileges and immunities of the citizen of the States, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by the clause under the protection of the Federal Constitution, and that the latter, whatever they may be are not intended to have any additional protection by this paragraph of the amendment." (p. 74.)
>
> * * *
>
> "Its purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify,

> or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction." (p. 77.)

(See also, *Duncan* v. *Missouri*, 152 U. S. 377, 382 [1894]; and *Hamilton* v. *Regents of the University of California*, 293 U. S. 245 [1934].)

This same interpretation of the privileges and immunities clause has been repeated in more recent times. In *Prudential Insurance Company* v. *Cheek* (259 U. S. 530 [1922]), this Court stated (p. 539):

> "But, as this court more than once has pointed out, the privileges or immunities of citizens protected by the Fourteenth Amendment against abridgement by State laws are not those fundamental privileges and immunities inherent in *State* citizenship, but only those which owe their existence to the Federal Government, its national character, its constitution, or its laws. [citing cases.]"

In an election case from the State of Illinois this Court discussed the clause as it affects election matters (*Snowden* v. *Hughes*, 321 U. S. 1 [1944]). The Court of Appeals for the Seventh Circuit had upheld the Illinois statute, holding among other things that the Fourteenth Amendment brings under Federal control only acts by States which are violative of rights secured by the United States Constitution (132 F. 2d 476 [1943]). Affirming, this Court specifically considered the validity of the Act under the privileges and immunities clause of the amendment. Thereon the Court held (321 U. S. at pp. 6-7):

> "The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely

from the relationship of the citizen and his state established by state law. * * * *The right to become a candidate for state office, like the right to vote for the election of state officers,* * * *is a right or privilege of state citizenship, not of national citizenship, which alone is protected by the privileges and immunities clause.*" [Emphasis added.]

The extent of the application of the equal protection clause was succinctly stated in *Henderson* v. *United States* (63 F. Supp. 906 [D. C. Md. 1945]), when the Court said (pp. 912-913):

> "The Equal Protection Clause of Art. IV, § 2, does not import that a citizen of one State carries with him into another State any fundamental privileges or immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but simply that in any State, every citizen of every other State shall have the privileges and immunities which the citizens of that State enjoy. In short, this provision merely prevents a State from discriminating against citizens of other States in favor of its own citizens. [citing authorities] * * * Similarly, the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against State abridgement. The Slaughter-House Cases. 16 Wall. 36, 21 L. Ed. 394."

Consequently, the rights protected under the Fourteenth Amendment do not include all attributes of citizenship. Specifically, they do not include voter qualifications unless the requirements for such qualifications are unreasonable, arbitrary or discriminate in violation of other constitutional provisions.

As this Court said in *Rice* v. *Sioux City Cemetery* (349 U. S. 70, 72 [1955]):

> "Only if a State deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment can its protection be invoked."

Section 4(e) of the Voting Rights Act of 1965 specifically states that it was enacted to secure Fourteenth Amendment rights. Unless the Federal activity in behalf of Puerto Rico, described in appellant's brief on this appeal, was in furtherance of some constitutionally guaranteed rights peculiar to residents of Puerto Rico or directly related to rights of United States citizenship protected by the Fourteenth Amendment, the amount or extent of such legislation is totally immaterial to the power of Congress to enact § 4(e), as appropriate to the enforcement of the Fourteenth Amendment.

It should be noted that the Congressional policies referred to in appellant's brief relate to Puerto Ricans *in* Puerto Rico. They are concededly enactments under Article IV, § 3 of the United States Constitution and the Treaty of Paris (30 Stat. 1754, 1759). However, neither of those authorities give former residents of Puerto Rico any superior rights over those of other citizens of their State of residence on the mainland. It is further significant to note that the Fourteenth Amendment does not apply to territories of the United States nor to citizens resident therein (*South Porto Rico Sugar Co.* v. *Buscaglia*, 154 F. 2d 96 [C. C. A. Puerto Rico, 1946]).

The rights protected by the Fourteenth Amendment are those inherent in United States citizenship, not territorial or State citizenship. The Constitution confers no special privileges upon citizens of the territories or the Commonwealth of Puerto Rico. In fact, and conclusive of the fact that the right to vote is not an incident of Federal citizenship, while citizens of the Commonwealth of Puerto Rico are citizens of the United States, they are not entitled to vote in Federal elections, so long as they remain residents of the Commonwealth.

As to United States citizens, the Constitution is satisfied if the State requirement as applied to all citizens within its borders, whatever their place of origin, is not discriminatory, arbitrary or unreasonable. New York's English literacy requirement applies to all voters, whethey they were born or education in New York, Puerto Rico, Arkansas, or France.

C. A requirement of literacy in English is a valid and constitutional voter qualification which a State may impose upon citizens resident therein.

The power of Congress under the Fourteenth Amendment to prohibit a State requirement of English literacy by its voters hinges upon whether such an English literacy requirement deprives any citizen of rights guaranteed by the Fourteenth Amendment. The reasonableness of such a State requirement does not rest upon whether it is reasonable for New Mexico, or Louisiana, or Hawaii to *permit* their voters to be literate in a language other than English but on whether it is reasonable for New York to require its voters to be literate in English.

Apropos the arguments raised as to those other States, it is interesting to note that in each case the language other than English, in which voters may qualify, is the language which was spoken by the residents of that area when it was acquired as a territory by the United States; it is in effect the native language of the area. Significantly, Hawaii requires literacy in English or Hawaiian but makes no provision for its many native-born citizens who may be literate only in Japanese or Chinese. Thus, the arguments as to what other States permit has no significance as to the power of Congress to require a State to permit literacy in a language, other than English, which is not native to the State.

Appellants herein concede the validity of a State requirement that its voters be literate (brief, p. 43); contesting only the validity of a requirement that voters be literate in English. The issue, however, is not that simple; for in the basic rationale supporting literacy requirements in general lies all the constitutional principle and much of the rationale supporting requirements of English literacy.

Only seven years ago this Court upheld the validity of North Carolina's English literacy requirement (*Lassiter* v. *Northampton Election Board*, 360 U. S. 45 [1959]) in a decision cited with approval in more recent cases (see, *e.g.*, *Gray* v. *Sanders*, 372 U. S. 368, 379 [1963]; *Carrington* v. *Rash*, 380 U. S. 89, 91 [1965]; and *cf. South Carolina* v. *Katzenbach, supra*, 34 L. W. at p. 4216 [1966]). Therefore, a close analysis of the *Lassiter* decision is essential to the issues on the instant appeal. The North Carolina constitutional provision there involved provided, in part:

> "Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language."

As to the validity of that requirement this Court held (pp. 50-51):

> "We come then to the question whether a State may consistently with the Fourteenth and Seventeenth Amendments apply a literacy test to all voters irrespective of race or color. The Court in *Guinn* v. *United States, supra*, at 366, disposed of the question in a few words, 'No time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted.'
>
> "The States have long been held to have broad powers to determine the conditions under which the

> right of suffrage may be exercised, * * * absent of course the discrimination which the Constitution condemns. * * * So while the right of suffrage is established and guaranteed by the Constitution * * * it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction which Congress acting pursuant to its constitutional powers has imposed. See *United States* v. *Classic*, 313 U. S. 299, 315. While § 2 of the Fourteenth Amendment * * * speaks of 'the right to vote,' the right protected 'refers to the right to vote as established by the laws and constitution of the State.' *McPherson* v. *Blacker*, 146 U. S. 1, 39.
>
> "We do not suggest that any standards which a State desires to adopt may be required of voters. But there is a wide scope for exercise of its jurisdiction."

Considerations which the States obviously might take into account in setting voter qualifications were listed by the Court as including age and previous criminal record. As to literacy, the opinion states (pp. 51-53):

> "The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. *Cf. Franklin* v. *Harper*, 205 Ga. 779, 55 S. E. 2d 221, appeal dismissed 339 U. S. 946. It was said last century in Massachusetts that a literacy test was designed to insure an 'independent and intelligent' exercise of the right of suffrage. *Stone* v. *Smith*, 159 Mass. 413-414, 34 N. E. 521. North Carolina agrees. We do not sit in judgment on the wisdom of the policy. We cannot say, however, that it is not an allowable one measured by constitutional standards."

In a lengthy footnote, this Court discussed the literacy requirements of the various States (pp. 52-53). It pointed out that 19 States have some sort of literacy requirement. Those States having specific provisions as to English literacy were distinctly specified,[1] clearly showing that this Court was aware, in considering the North Carolina statute, of the requirement of literacy specifically in English.

Concluding that the North Carolina provision was valid, the Court held (pp. 53-54):

> "The present requirement, applicable to members of all races, is that the prospective voter 'be able to read and write any section of the Constitution of North Carolina in the English language.' That seems to us to be one fair way of determining whether a person is literate, not a calculated scheme to lay springes for the citizen. Certainly we cannot condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot."

Conceding that literacy in general may be required of prospective voters, the question involved in the instant appeal is whether a requirement of literacy in English has sufficient relation to the aims of representative government and a legitimate State interest in an informed electorate (see, *Carrington* v. *Rash, supra*, and *cf. Louisiana* v. *United States*, 225 F. Supp. 353, 386 [E. D. La.], affd. 380 U. S. 145).

Both prior to and following this Court's decision in the *Lassiter* case, *supra*, the constitutionality of New York's

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[1] The Court in the *Lassiter* case listed New York, Wyoming, Connecitcut and Washington, in addition to North Carolina as requiring English literacy. The record on this appeal additionally lists Alabama, Alaska, Arizona, California, Delaware, Georgia, Hawaii, Maine, and Massachusetts as having English language literacy requirements (R. 72).

English literacy requirement was challenged in a multiplicity of court actions. In *Camacho* v. *Doe* (31 N. Y. Misc. 2d 692 [Sup. Ct., Bronx County, 1958]), the New York Supreme Court held that requirement valid, stating (p. 693):

> "None of these provisions contravene the United States Constitution. The petitioner is not denied the right to vote. Under the laws of the State, however, he must first learn to read and write English. This cannot be deemed an unreasonable requirement."

This decision was affirmed, without opinion, by the New York State Court of Appeals (7 N. Y. 2d 762 [1959]). The petitioner in that case then commenced a proceeding before a three-Judge Court in the Southern District of New York (*Camacho* v. *Rogers*, 199 F. Supp. 155 [1961]). The complaint there alleged that petitioner's right to vote was guaranteed by the Treaty of Paris, the Fourteenth Amendment, the Fifteenth Amendment, the Federal Civil Rights Act and the United Nations Charter (199 F. Supp., p. 157). The complaint was dismissed on the ground of *res judicata*, based on the judgment in the State Court action. However, the Court also expressed its views on the merits of the claim. The Court reiterated the principles, discussed above at length, concerning the power of the States to establish voting standards. It pointed out that State requirements, such as absence of criminal conduct, residing within the State for a designated period, and passing of literacy tests in general, had all been held valid. Citing the *Lassiter* case, *supra*, the Court stated (p. 159):

> "While this case discussed the provision in the North Carolina statute requiring literacy and ignored the further requirement that it be in the English language, the above quotation is just as apposite for a person literate in a foreign tongue. The plaintiff

here is in no different position than children born in the United States and taken from the country at an early age and who return after reaching their majority and are 'literate' only in a tongue other than English. Plaintiff's argument, if carried to its logical conclusion, would mean that these people, no matter what their foreign tongue may be, should be entitled to vote as long as they are literate in such foreign tongue.

"The statute is not an unreasonable exercise of the powers of the State to provide requirements for exercising the elective franchise. It is not unreasonable to expect a voter not only to be conversant with the issues presented for determination in choosing between candidates for election, but also to understand the language used in connection with voting. For example, there are printed in English on the ballot synopses of proposed Constitutional amendments, titles of the offices to be filled and directives as to the use of the paper ballot or voting machine. Finally, what is more proper than that the voter be literate in the language used to conduct the business of government in his State."

Peculiarly enough, and of some significance to this case, in the Federal *Camacho* case, the Justice Department, by Burke Marshall, then Assistant Attorney General in charge of the Civil Rights Bureau and Robert M. Morgenthau, United States Attorney, filed a brief *amicus curiae* on behalf of the United States of America and in support of the constitutional validity of New York's English literacy requirement. In that brief the Justice Department argued first that the validity of English literacy requirements was decided by this Court in the *Lassiter* case, *supra*, but as to the general reasonableness and validity of such requirements the brief continued:

"Second, in any event, it cannot be said that the New York requirement which distinguishes between English and non-English speaking people is so un-

reasonable as to contravene the Constitution and the Civil Rights Act of 1957.

"One reasonable method for insuring an informed electorate in a country where English is, by far the dominant language, is to require that voters be able to read and write English. An informed electorate must have access to the myriad of conflicting viewpoints which contribute to the making of political decisions. In a country and State where the predominant and official language is English, it is reasonable to suppose that these views are more fully accessible to those who understand the English language.

"To be sure, Spanish language newspapers are published in New York City and are available to residents of the City and environs, but, at best, one wholly dependent upon such sources, however excellent they may be, is denied access to the great and varied body of the American press. In addition, the Court in considering this case must view the State of New York as a whole. Large areas of the State are not served by Spanish-language newspapers. Residents of these areas who are literate only in Spanish do not have available sufficient sources of information to permit them to qualify as informed electors.

"This case does not involve an interplay between discrimination in educational opportunity on the one hand and a literacy test as a prerequisite to voting on the other, for in New York educational facilities of very great scope and variety are available to all citizens regardless of race or color. Nor does it involve a tightening of literacy standards after one racial group has achieved electoral dominance."

The United States brief there also pointed out that when the English literacy requirement was inserted in the Constitution in 1922 there were only 7,719 Puerto Rican-born citizens in New York compared with 191,305 in 1950, and an estimated 610,000 in 1959, and that the literacy requirement "clearly was not aimed at Puerto Rican-Americans."

We have quoted here at such length from that brief because it aptly outlines many of the arguments in favor of the constitutionality of the New York literacy requirements. But to these arguments other considerations must be added.

In approving the suspension of literacy tests in *South Carolina* v. *Katzenbach*, *supra*, this Court described the origin of the literacy tests there involved, stating (34 L. W. p. 4209):

> "These laws were based on the fact that as of 1890 in each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write."

In a footnote the opinion points to further evidence of the fact that the literacy tests there involved were initiated as part of a movement to disenfranchise Negroes (34 L. W. p. 4209).

No such evidence of intentional discrimination against any group can be shown with reference to New York's literacy requirement. Earlier in this brief we have detailed the legislative history of the New York law (*supra*, pp. 8-11). That history shows that these provisions were inserted in the law not to discriminate against any group but as a part of a program to reduce the illiteracy which had become startingly apparent in World War I and to promote industrial efficiency and safety. Broad Education Law amendments were adopted at the same time extending night schools for adults and additional training for minors between 16 and 21. New York's English literacy test was not and is not a vehicle for discrimination but rather what this Court in the *Lassiter* case, *supra*, described as a device related to the desire of the State "to

raise the standards for people of all races who cast the ballot" (360 U. S. at p. 54). It applies alike to persons of all races, creeds, colors, national or state origins and no suggestion has ever been made that New York's test is applied in a discriminatory manner. In fact, the test, administered by the State Board of Regents not by election boards, has been described as precluding discrimination "so far as is humanly possible" (McGovney, *The American Suffrage Medley* [1949] 62-64).

Subsequent to the *Camacho* cases, another action was commenced in Supreme Court, New York County, in 1964 (*Cardona* v. *Power*). That Court dismissed the petition, an appeal was taken to the State Court of Appeals which affirmed the dismissal (16 N. Y. 2d 639 [1965]) and a further appeal was taken to this Court and is now pending here (No. 673, this term).

On the record in this case it is argued that New York's English literacy requirement disenfranchises hundreds of thousands of Puerto Ricans living in New York City. There are, however, actually no facts in the record which indicate how many Puerto Ricans, otherwise eligible to vote in New York, are unable to do so solely because of New York's English literacy requirement. There are affidavits from several persons who refer to the numbers or percentages of persons in the area who speak Spanish; this, however, is not proof that these people do not also speak English.[2]

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[2] The consensus of the studies which have been undertaken in recent years is that the majority of Puerto Rican migrants do have some knowledge of written, as well as spoken, English. English is a required subject in Puerto Rican schools, beginning in the first grade (Clarence Senior, *Strangers Then Neighbors*, [Freedom Books, 1961] p. 58). In spite of the late start pupils generally get in Puerto

(Footnote continued on following page)

Of course, *if* the right to vote or demonstrate literacy in Spanish is a constitutional right, the numbers of persons involved is immaterial. But the issue of whether a requirement of English literacy creates an invalid classification or denies to any person equal protection of the laws may very well depend on numerical relationships. If 50 per cent of the adult population of the State were literate only in Spanish, then it would seem apparent that a limitation of the franchise to persons literate in English might be invalid as an unreasonable classification. Therefore, an examination of some relevant statistics may help to place the issue here involved in its proper perspective, i.e., by far the majority of eligible Puerto Rican residents of New York do register and vote and can comply with New York's English literacy requirement.

The 1960 census listed the total Puerto Rican population of all ages in New York State at 642,622 (United States Census of Population, 1960; *Puerto Ricans in the United States*, Table 6). Of this total, 194,037 had been born on the mainland and may be presumed literate in English, if adults. In 1960, approximately half the total population (344,836) were 20 years of age or older. The figures as to New York City alone show a 1960 population of 612,574, of which total 182,864 were mainland born.[8]

(Footnote continued from preceding page)

Rican schools (the average beginning age is between 6 and 8 as compared with 5½ to 6½ on the mainland), the typical island-schooled child, even though a relatively recent arrival in mainland schools did exhibit ability to read English, even in lower elementary grades (*Who Are the Puerto Rican Pupils in the New York City Public Schools?*, Puerto Rican Study Research Report, Board of Education City of New York, 1956, pp. 30, 50).

[8] *The Puerto Rico Problem*, Edward B. Lockett, p. 186 (Exposition Press, 1964).

If the same percentages apply to the City as to the State as a whole, approximately 300,000 Puerto Ricans in New York City were of voting age in 1960. Adopting the 60% estimate for completion of a 7th grade education in any language (R. 75), approximately 200,000 Puerto Ricans would have been eligible to vote in New York in 1960 if literacy in either English or Spanish were permitted.

Actual Puerto Rican political participation has increased greatly in recent years. Clarence Senior, former director of the Social Science Research Center of the University of Puerto and now a member of the New York City Board of Education, in his book "Strangers Then Neighbors" (Freedom Books, 1961) points out (p. 69):

> "The Puerto Rican vote in New York City rose from about 35,000 in the 1954 election to about 85,000 in 1956. In 1960, as the result of an intensive registration campaign carried out through the combined efforts of the Commonwealth of Puerto Rico's Migration Division, Puerto Rican community groups, the Spanish-language press, radio, and theatres, and the political parties, total Puerto Rican and Hispanic registration in New York City rose to 230,000 (*New York Times*, November 2, 1960)—a remarkable achievement for a group the majority of whose members have been in New York for less than a decade."

These registration totals were reached at a time when the City Board of Elections complied with State law and required proof of literacy in English. These registration figures are supported by voting figures in the 1961 New York City mayoralty election.

> "San Juan's lady mayor, Felissa Rincon de Gautier, herself came to New York to campaign vigorously for Wagner, and to ride attentive herd on the New York City Puerto Rican vote. On Wagner's election, she hailed his victory as the 'birth of real Puerto Rican

bloc voting' on the mainland. She reported that of New York's approximately 750,000 first and second generation Puerto Ricans of all ages, 200,000 had cast votes, and had balloted 9 to 1 for Wagner.'"[4]

From these facts it is apparent that New York's English literacy requirement has not resulted in the disenfranchisement of all or even a substantial majority of Puerto Rican residents of New York. This conclusion is further substantiated by the fact that after the enactment of § 4(e) only a relatively small number of Puerto Ricans registered in the City of New York although the Board of Election publicly announced that it would follow the provisions of § 4(e) rather than State law.[5]

New York has long been the major port of entry into this country of people from abroad, many of whom settled permanently in New York and, while enriching the State with the contributions of their various cultures, also provided the State with a population of foreign born or foreign educated persons unequaled numerically in any other State of the Union.[6] What is more natural and reasonable under such circumstances than that the State, with an aim toward integration of these diverse groups into the structure of American political culture, as well as socially and economically, require its voters to be literate in English?

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[4] *The Puerto Rico Problem*, Edward B. Lockett (Exposition Press, Inc. 1964), p. 53.

[5] Only 8,107 Puerto Ricans registered in 1965 under § 4(e), as contrasted to pre-registration estimates of 300,000. *N. Y. Times*, Nov. 16, 1965, p. 38.

[6] The census of 1960 showed that 19 per cent of the population of New York City were still foreign-born, 28 per cent were children of foreign-born parents, 8 per cent were of Puerto Rican birth or parentage. *Beyond the Melting Pot*, Nathan Glazer and Daniel Patrick Moynihan, (M. I. T. Press, 1963), p. 7.

An inability to speak, read or write English deprives a voter of access to the great mass of political comment and information as to political and governmental issues of the day. It leaves him dependent upon a few sources of information which may be available in his own language and which may reflect partisan political prejudices and beliefs. For the most part, such a voter is also deprived of contact with, access to, and direct evaluation of the candidates themselves. In certain election districts local candidates do campaign in languages other than English. But candidates for city-wide, state-wide or national offices seldom have the varied language backgrounds necessary to reach voters in the many different languages spoken by identifiable national groups in this State.

Of some significance also on this point is the fact that not only are the ballots printed in English, but also the instructions for voters and the synopses of the propositions, referenda and State Constitutional amendments to be voted upon. In the November election last year voters were called upon to vote on 3 propositions authorizing State indebtedness, a question on the calling of a State constitutional convention, and 9 proposed amendments to the State Constitution. Furthermore, a voter is entitled to ask for assistance from the inspectors of election. If voter and election officials cannot communicate with each other in a common language, the voter's attempt to exercise his franchise may be frustrated as a practical matter.

Consequently, we submit that New York's English literacy requirement is just and reasonable, it does not unfairly discriminate against any group of citizens and violates no provision of the Fourteenth Amendment. Section 4(e), therefore, does not constitute "appropriate" legislation under that amendment.

POINT III

The power of Congress to govern the territories does not authorize the enactment of a statute applying to no territory but affecting only the internal laws of the States, enacted under constitutional authority, which apply in a non-discriminatory manner to all citizens alike.

While not encompassed within the pleadings, the defendants advanced, on oral argument in the Court below, the theory that if Congress could not enact § 4(e) under the Fourteenth Amendment, the statutory provision could be sustained as an exercise of the power of Congress to legislate for the territories under Article IV, § 3, of the Constitution, which authorizes Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States". The same argument has been raised by appellants on this appeal. It is contended that since § 4(e) relates to citizens of the United States *who had been* residents of Puerto Rico, the power of Congress to legislate for the Government of Puerto Rico includes the authority to enact this provision. In making this argument, appellants contend that the power to govern the territories extends beyond the geographical boundaries of the territory and enables Congress to enact legislation at will regulating the States and conferring rights on or restricting rights of American citizens who were at one time resident in Puerto Rico. In rejecting this argument, the Court below held (R. 90):

> "There are two answers to this contention. First, Section 4(e) is broad and comprehensive in its terms and is neither limited to nor directed solely to Puerto Ricans and, therefore cannot be deemed an exercise of the power to legislate for Puerto Rico. Second, and more important, the power of Congress to legislate for

a territory does not embrace authority to confer additional rights on citizens of the territory when they migrate to other parts of the United States. The Congress may not endow them with rights not possessed by other citizens of the State to which they have moved."

In support of their contentions, appellants cite the long history of special legislation applying to Puerto Rico and other territories. However, this legislation uniformly has related to the government of the territory itself, the personal and political rights of residents of the territory while within the territory, or the raising of revenue for the benefit of the territory even when raised outside the geographical bounds of the particular territory. *Significantly, none of this legislation has purported to regulate the States or to prohibit State exercise of constitutionally reserved powers.* Section 4(e), however, does precisely that. It does not purport to govern the Territory of Puerto Rico or determine status or rights of residents of the Commonwealth. Instead, it acts as a legislative limitation upon the constitutionally reserved right of the States to determine the qualifications of electors in the States.

In considering that argument the power to enact § 4(e) should be viewed in the light of the precise wording of the constitutional provision providing for the government of the territories. Article IV, § 3, grants to Congress the power to make "needful Rules and Regulations respecting the Territory * * * belonging to the United States". It does not grant Congress any similar power to govern the States. Appellants argue that Congress regulates the States in requiring them to accept territorial citizens as citizens of the United States, but that regulation is inherent in citizenship status under the Constitution, a status conferred upon citizens of the territories *in situ*, within the

territory, and, as in the case of all American citizens, a status carried with them as they move into any State.

The power of Congress as it relates to the territories has been frequently described by the Courts. It has been said to be a plenary power (*National Bank* v. *County of Yankton*, 101 U. S. 129 [1879]; *Cases* v. *United States*, 131 F. 2d 916 [C. C. A., 1st Cir., 1942], cert. den. 63 S. Ct. 1431) and supreme power (*Murphy* v. *Ramsey*, 114 U. S. 44 [1885]). The distinction between the power of Congress to regulate the territories and its power to legislate with reference to the States has also been the subject of judicial scrutiny. In *Cincinnati Soap Co.* v. *United States* (301 U. S. 308 [1937]), this Court held (p. 323):

> "In dealing with the territories, possessions and dependencies of the United States, this nation has all the powers of other sovereign nations, and Congress in legislating is not subject to the same restrictions which are imposed in respect of laws for the United States, considered as a political body of states in union."

Again in *Hooven & Allison Co.* v. *Evatt* (324 U. S. 652 [1945]), this principle was reiterated in the holding (p. 674):

> "In exercising this power [to govern the territories], Congress is not subject to the same constitutional limitations, as when it is legislating for the United States."

The converse of this is also true. When Congress legislates as to the States, it *is* limited by constitutional restrictions. Section 4(e) governs the States, not the territories.

The nature of the Congressional power in relation to the terrritories is distinct, not only in extent but in kind. As to the States, Congress acts only as a Federal legislature, but as to the territories its power is unique.

At the end of the last century, the Supreme Court described this peculiar power (*Simms* v. *Simms*, 178 U. S. 162 [1899]), stating (p. 168):

> "In the Territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a State might legislate within the State; and may, at its discretion, intrust that power in the legislative assembly of a Territory."

The limitations upon and extent of the power of Congress in governing the territories was dealt with at some length in a case involving qualifications of voters in a territory (*Murphy* v. *Ramsey, supra*). An Act of Congress had denied the right of suffrage to inhabitants of Utah who were parties to bigamous or polygamous marriages. In upholding the statute, the Court held (114 U. S. at pp. 44-45):

> "The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be admitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited. But in ordaining government for the Territories, and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress; and that extends, beyond all controversy to determining by law, from time to time, the form of the local government in a particular Territory, and the qualification of those who shall administer it. It rests with Congress to say whether, in a given case, any of the people, resident in the Territory, shall par-

> ticipate in the election of its officers or the making of its laws; and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient. The right of local self government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the government of the United States was expressly reserved. The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States."

The determination of the qualifications of voters in a State is the province solely of the State government; it is a power reserved to the States. Consequently, when Congress enacts voter qualification statutes for the territories, it acts not as the Federal legislature but in an exercise of the State legislative powers it possesses as to the territories. If, as alleged, § 4(e) was enacted under the power of Congress to govern the territories, has only the force and effect of a State law. Its validity depends upon whether a State legislature could enact such a statute applying only to other States. If § 4(e) is a valid exercise of the power of Congress to regulate the territories, then a State having no literacy test (such as Florida) could pass legislation granting to its residents the right to move to another State and vote there without being subjected to any literacy requirements.

If Congress may under its power to govern the territories, give special status to former residents of Puerto Rico after they come to the mainland, then Congress could

require the States to recognize professional licenses granted by the Government of Puerto Rico without regard to the State's qualifications for its own residents, or provide that residents of Puerto Rico may practice law before any Court in the United States in Spanish and without being admitted to practice therein.

It is argued that § 4(e) is in furtherance of an affirmative Congressional policy to foster use of Spanish as the predominant classroom language in Puerto Rico; that it is a part of the policy of the Federal government to make Puerto Rico the "Showplace of Latin America". Parenthetically, it may be observed that from the history of the language of teaching in the Puerto Rican schools, as outlined in Appellants' brief, the selection of Spanish as the language of teaching was not the result of any affirmative Congressional policy, but rather the result of a *laissez faire* attitude toward the administrative government of Puerto Rico. Be that as it may, however wisely conceived a policy may be from State Department standards, the development of such a policy does not authorize restrictions by Congressional enactment upon the constitionally reserved powers of the States. As this Court said in a case relating to trials of American citizens abroad (*Reid* v. *Covert*, 354 U. S. 1, 14 [1954]):

> "If our foreign commitments become of such nature that government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there."

Nor can it be conclusively said that the status of Puerto Rico as the "Showplace of Latin America" requires Spanish language instruction. Samoa has, in recent years, become the showplace of the Pacific and there heavy emphasis

is placed upon the use of English even in elementary teaching (Clarence Hall, *Samoa: America's Showplace of the South Seas*, Reader's Digest, November, 1965, p. 157 *et seq.*).

It is clear that Congress, in enacting § 4(e), was not governing the Commonwealth of Puerto Rico or any other territory. It was instead determining what qualifications the States could require of their own resident voters based solely upon the prior place of residence of a selected group of prospective voters. This type of regulation is not within either the power of Congress to govern the Territories or its power under the Fourteenth Amendment.

POINT IV

Section 4(e) is itself discriminatory in that it prefers one class of native-born citizens over another.

Section 4(e) specifically applies only to citizens whose education in a language other than English was in American-flag schools. That section would invalidate New York's English literacy requirements as to that single class of persons. In so doing, however, it would deny the equal protection of the laws to other native-born citizens who were not literate in English.

A native-born citizen reared abroad and educated in a foreign language would still be required to demonstrate literacy in English in order to qualify to vote, although a Puerto Rican or resident of any territory of the United States, no more or less a citizen and no more or less proficient in English, would not have to do so.

True, § 4(e) sets up a distinct class of citizens and treats members of that class equally, but mere classification does not establish equal protection. As the United States Su-

preme Court reminds us in *Carrington* v. *Rash*, *supra* (p. 93):

> "'The court must reach and determine the question whether the classifications drawn in a statute are reasonable in the light of its purpose * * *.' *McLaughlin* v. *Florida*, 379 U. S. 184, 191."

A classification deliberately applying to only one group of native-born citizens, educated in a language other than English, provides no reasonable basis for the exclusion of other groups of citizens whose education may similarly have been in a language other than English.

Today, New York's English literacy requirement applies equally to *all* voters. Under the Federal law, an artificially created and arbitrary class of citizens would be excluded from that requirement.

No more discriminatory or unequal provision of law could be conceived. The act itself establishes discrimination where none previously existed. The statute would have to be held unconstitutional on this ground alone.

CONCLUSION

The order and judgment of the Court below should for the foregoing reasons be affirmed.

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Respectfully submitted,

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